Supreme Court, U.S.
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NO. 85-236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRY EICHENLAUB, Warden Clinton County Jail
Petitioner

v.

DAVID ALAN YURKY, MR. ZIMMERMAN, Warden SCI at Huntingdon, MR. WICKER, Deputy Superintendent SCI at Huntingdon,
Respondents

MEMORANDUM OF PETITIONER HARRY W. EICHENLAUB IN OPPOSITION TO MEMORANDUM OF RESPONDENT SUGGESTING MOOTNESS

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Petition for Certiorari filed August 8, 1985
Certiorari granted January 13, 1986

TABLE OF AUTHORITIES

Page

CASES

Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed. 2d 622 (1974)..... 5

Griffin v. County School Board, 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed. 2d 256 (1964)..... 5

Kentucky v. Graham, 105 S. Ct. 3099 (1985)..... 3

Lincoln County v. Luning, 133 U.S. 529, 10 S. Ct. 363, 33 L.Ed. 766 (1890)..... 5

McSurely v. McClellan, 753 F.2d 88 (C.A.D.C. 1985)..... 7

Moor v. County of Alameda, 411 U.S. 693, 93 S. Ct. 1785, 36 L.Ed. 2d 596 (1973)..... 5

Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed. 2d 509 (1981)..... 6

Rende v. Kay, 415 F.2d 983 (C.A.D.C. 1969)..... 7

Rizzo v. Goode, 423 U.S. 362, 561 (1976)..... 6

STATUTES

61 P.S. §409..... 4

RULES

Federal Rule of Appellate Procedure 43(a)..... 2,7

Federal Rule of Civil Procedure 25(a)..... 7

Supreme Court Rule 40.1..... 2

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Respondent, Harry W. Eichenlaub and his successor Arwyn Reish and the Estate of Harry W. Eichenlaub to be substituted by their counsel, Candor, Youngman, Gibson & Gault, respectfully submits this Memorandum of Petitioner in opposition to

the suggestion of mootness by the Respondent in the above captioned matter, and advises the Court of facts as follows:

1. The suit of Respondent requested in addition to damage relief, injunctive relief (J.A. 27).

2. Harry W. Eichenlaub's death occurred before the Petition for Certiorari was filed in this Court. As such, the matter of substitution is not provided for in Supreme Court Rule 40.1. Rather, the matter of substitution is controlled by Federal Rule of Appellate Procedure 43a, which provides that substitution is to be effected after the notice of appeal is filed in accordance with 43a. Rule 43a does not provide for abatement of the action.

3. A Motion is being made to the Third Circuit Court of Appeals to substitute the Estate of Harry W. Eichenlaub for Harry W. Eichenlaub as Petitioner with respect to the personal liability.

4. Harry W. Eichenlaub, as Warden of Clinton County Jail, was an employee of Clinton County, and enunciated the policy of Clinton County with respect to having post-transfer independent tribunal hearings in the case of transferred prisoners. As such, the action was an official capacity suit because an administrative policy was involved. Kentucky v. Graham, 105 S. Ct. 3099 (1985).

5. By Opinion of the Attorney General of Pennsylvania of 1971, No. 55, which is attached hereto and marked as Exhibit "A", the warden at a County pri-

son has power to make rules and regulations for the government and management of the prison in the safekeeping, discipline and employment of the prisoners as may be deemed necessary, construing 61 P.S. §409.[1]

6. Eichenlaub, in transferring Yurky, acted in his official capacity as Warden of the prison, and as such as an official of Clinton County, Pennsylvania.

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[1]61 P.S. §409 provides as follows: "That, within thirty days after this act shall become effective in any county, the above-named board shall meet and organize by the election of a president and secretary. A majority of the members of said board shall constitute a quorum for the transaction of business, and all actions of said board must be by the approval of a majority of all the members of said board. The board shall meet monthly, or oftener if required, and keep regular minutes of their proceedings in a book, to be filed with the financial records of each of said counties, and shall make such rules and regulations for the government and management of the prison,

7. The action is not barred by the Eleventh Amendment since the State will not pay the money damages in this case, but they will be paid by Clinton County. See Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed. 2d 662 (1974); Lincoln County v. Luning, 133 U.S. 529, 10 S. Ct. 363, 33 L.Ed. 766 (1890); Moor v. County of Alameda, 411 U.S. 693, 93 S. Ct. 1785, 36 L.Ed. 2d 596 (1973); Griffin v. County School Board, 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed. 2d 256 (1964).

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and the safekeeping, discipline, and employment of the prisoners, as may be deemed necessary. Such meetings shall be held at the prison no less than quarterly. The board shall appoint a warden of the prison. The warden, subject to the approval of the board, may appoint such deputy or deputies, assistant or assistants, keeper or keepers, as may be required in the taking care of the prison. The number and compensation of such deputies, assistants, or keepers shall be

8. This case is not controlled by the case of Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L.Ed. 2d 561 (1976) inasmuch as the Plaintiff was affected in his own rights by the policy of Clinton County and seeks injunctive relief for the future. See Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed. 2d 509 (1981).

9. Eichenlaub was acting in his official capacity in denying the post-transfer hearing.

10. Eichenlaub's position and the position of the County in this suit is that Petitioner is not entitled to a post-transfer independent tribunal hearing.

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fixed by the salary board." This statute has been amended since 1971; however, the statute has not been amended concerning the powers and duties of the warden of the prison.

11. Petitioner claims denial of his Fourteenth Amendment rights to due process as part of his claim.

12. The case of McSurely v. McClellan, 753 F.2d 88 (C.A.D.C. 1985), sets forth how substitution is to be effected. Said substitution may be effected by Plaintiff at this time, either in accordance with F.R.A.P. 43(a) or in accordance with F.R.C.P. 25(a). See also Rende v. Kay, 415 F.2d 983 (C.A.D.C. 1969).

WHEREFORE, the case is not moot, has not abated and substitution of the Administrator of the Estate of Harry Eichenlaub is proceeding.

CANDOR, YOUNGMAN, GIBSON & GAULT

By _____
John C. Youngman, Jr., Esquire
Attorneys for Petitioner

EXHIBIT "A"

OFFICIAL OPINION NO. 55,

Prisoners—Furloughs—Inmates of county prisons.

1. 19 P. S. § 1179.1 provides that persons sentenced to county jails may be permitted upon an order of the court, to leave the jail during necessary and reasonable hours for the purpose of working at their employment, but states nothing about authorizing furloughs for other purposes.

2. 61 P. S. § 409 authorizes the Warden of the County Prison to make rules and regulations for the Government and Management of the Prison, but is not broad enough to permit the Warden to grant furloughs.

Harrisburg, Pa.,
August 5, 1971

Major John D. Case
Warden
Bucks County Prison
Doylestown, Pennsylvania 18901

Dear Warden Case:

Sometime ago you discussed with me the question of whether you are authorized by present law to grant furloughs to inmates in your institution.

19 P. S., § 1179.1, provides that persons sentenced to county jails may be permitted to leave the jail during necessary and reasonable hours for the purpose of working at their employment, conducting their own business or other self-employed occupation, including, in the case of a woman, housekeeping and attending to needs of her family, seeking employment, attendance at an educational institution or securing medical treatment. This permission may be granted to an inmate upon an order of the Court. This statute says nothing about authorizing furloughs for other purposes. 61 P. S., § 409, authorizes the warden of a county prison to make rules and regulations for the government and management of the prison and the safekeeping, discipline and employment of the prisoners as may be deemed necessary. This section might possibly be construed to permit furloughs by the warden, but it is my judgment that you are not authorized by this section to permit furloughs. You will note that 61 P. S. § 1052(b), which governs the Bureau of Correction, provides for wider latitude in permitting release or furloughs of inmates.

In view of this I think it would be well for us to seek legislation giving the warden of county prisons expanded authority with regard to furloughs.

Very truly yours,

J. SHANE CREAMER,
Attorney General.